

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Hearing Officer Notice Soliciting Comments on Whether the  
Department Should Open an investigation to Establish an Instate  
Universal Service Fund

D.T.E. 03-45

**MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.  
FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION**

AT&T Communications of New England, Inc. (“AT&T”) requests that the Department of Telecommunications and Energy (the “Department”) grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that the non-public AT&T response to *Department’s First Set of Information Requests*, DTE-1-1, be granted protective treatment because it contains competitively sensitive and highly proprietary information and trade secrets.

**I. LEGAL STANDARD.**

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g., Hearing Officer’s Ruling On the Motion of CMRS Providers for*

*Protective Treatment and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B, at 7-8 (1997)

(the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive market). In determining whether certain information qualifies as a “trade secret,”<sup>1</sup>

Massachusetts courts have considered the following:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and its competitors;
- (5) the amount of effort or money expended by the employer in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the

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<sup>1</sup> Under Massachusetts law, a trade secret is “anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement.” Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that “[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers.” *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc.*, 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that “a trade secret need not be a patentable invention.” *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

U.S. Supreme Court stated that the board has “the right to keep the work which it had done, or paid for doing, to itself.” Similarly, courts in other jurisdictions have found that “[a] trade secret which is used in one’s business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one’s competitors were compelled.” *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

## **II. ARGUMENT.**

In DTE-1-1, the Department seeks revenue and cost information for the provision of local exchange service by AT&T to residential customers. The nature of this information sought by the Department is inherently competitively sensitive, and has substantial commercial value. In fact, knowledge by another company of AT&T’s costs would allow that competitor the unfair advantage of strategically developing its business activities and pricing in direct response to AT&T’s internal costs. Moreover, many of these costs are determined by reliance on further internal and proprietary information, the public disclosure of which would provide competitors unfair advantage. AT&T’s switched usage costs, for example, are based upon AT&T residential customer data. As explained in further detail below, AT&T has incurred significant expense in order to collect and analyze data regarding customer behavior responding to service options and prices. Moreover, it is upon such data that AT&T’s service options, prices and even market entry decisions are based. The disclosure of such information – information that AT&T developed at great expense – would confer an unfair competitive advantage on AT&T’s competitors.

The cost and revenue information that is the subject of this motion was developed by AT&T, at AT&T's expense, and for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who view this information are allowed to use it for internal business reasons only. Furthermore, as discussed herein, this information is commercially valuable such that it could be used unfairly by competitors to their own advantage.

Indeed, the Department has previously ruled that information that, if made public, would assist competitors in developing competing marketing strategies, are proprietary materials which warrant protective treatment.<sup>2</sup>

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<sup>2</sup> *Hearing Officer's Ruling On Motions For Confidential Treatment By Verizon New England, INC. D/B/A Verizon Massachusetts*, D.T.E. 01-20, at 11 (2001).

**Conclusion.**

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D, that the Department grant protective treatment to the non-public AT&T response to DTE-1-1.

Respectfully submitted,

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By Its Attorney,

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August 25, 2003